

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	
ARLIE L. DAVISON AND)	
ASSOCIATES INC. (formerly Windsor)	File Nos. BAL-920214EE
Communications, Inc., a Wisconsin)	BALH-920214EF
Corporation))	
Assignor)	
WINDSOR COMMUNICATIONS, INC.)	
OF WYOMING)	
Assignee)	
WINDSOR COMMUNICATIONS, INC.)	File Nos. BAL-920214EG
OF WYOMING)	BALH-920214EH
Assignor)	
WINDSOR COMMUNICATIONS, INC.)	
OF WYOMING,)	
DEBTOR-IN-POSSESSION)	
Assignee)	
WINDSOR COMMUNICATIONS, INC.)	File Nos. BAL-920214EI
OF WYOMING,)	BALH-920214EJ
DEBTOR-IN-POSSESSION)	
Assignor)	
JAMES T. DINNEEN, TRUSTEE IN)	
BANKRUPTCY)	
Assignee)	
JAMES T. DINNEEN, TRUSTEE IN)	File Nos. BAL-951207ED
BANKRUPTCY)	BALH-951207EE
Assignor)	
MAGIC CITY MEDIA, INC. ¹)	
Assignee)	
For Assignment of the Licenses of)	
Stations KUUY(AM), Orchard Valley,)	
WY and KKAZ-FM, Cheyenne, WY)	

¹ The caption in this proceeding has been changed to reflect the abandonment of the previously granted application to assign the subject licenses to Julander Media Corporation and the submission of a new application to assign the licenses to Magic City Media, Inc. See *infra* para. 2.

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 1996

Released: October 23, 1996

By the Commission:

1. The Commission has before it an application for review filed by Frederick J. Berger and KMUS, Inc. (collectively, "KMUS")² of a June 5, 1995 letter ruling (the "Letter Ruling") from the Chief, Audio Services Division.³ By that action the Mass Media Bureau denied a July 12, 1993 petition for reconsideration of the grant of an application (the "Windsor-Wyoming Application") to assign the licenses of KUUY(AM), Orchard Valley, Wyoming and KKAZ-FM, Cheyenne, Wyoming (collectively, the "Station Licenses") from Windsor Communications, Inc., a Wisconsin corporation ("Windsor-Wisconsin") to Windsor Communications, Inc. of Wyoming ("Windsor-Wyoming"). In addition, the Letter Ruling denied reconsideration of the staff actions granting involuntary assignments of the Station Licenses from Windsor-Wyoming to Windsor Communications, Inc. of Wyoming, Debtor-in-Possession ("D-I-P") and from D-I-P to James T. Dinneen, Trustee in Bankruptcy (the "Trustee"). Finally, the Letter Ruling also granted applications to assign the Station Licenses from the Trustee to Julander Media Corporation ("Julander") and to renew the KUUY(AM) license.⁴

2. On December 7, 1995, following the release of the Letter Ruling, the Trustee requested the "withdrawal" of the Julander assignment application and filed a new application (the "Magic City Application") to assign the Station Licenses to Magic City Media, Inc. ("Magic City"). On February 13, 1996 the Trustee notified the Commission that the sale to Julander would not be consummated. In response to these developments, KMUS, Inc. petitioned to deny the Magic City Application.⁵ The series of applications to assign the Station Licenses, ultimately to Magic City,

² KMUS, Inc. is the licensee of KMUS(FM), Burns, Wyoming. At the time the petition to deny was filed, Frederick J. Berger was president, director and 50 percent shareholder of KMUS, Inc.

³ Also on file are an opposition to application for review filed on July 24, 1995 by James T. Dinneen, Trustee for the Bankruptcy Estate of Windsor Communications, Inc. of Wyoming, and a reply thereto filed on August 4, 1995 by KMUS.

⁴ In connection with the grant of KUUY(AM) license renewal application, the Letter Ruling denied a related KMUS, Inc. petition to deny. KMUS, Inc. has not sought review of this action.

⁵ The petition to deny merely reiterates the arguments set forth in the application for review. KMUS, Inc. requests that the Commission deny the Magic City Application or defer action on it until these allegations are resolved. Also on file are oppositions to the petition to deny filed on February 26, 1996 by Magic City and on February 27, 1996 by the Trustee. KMUS, Inc. filed a consolidated reply thereto on March 7, 1996. On April 15, 1996 KMUS, Inc. filed a supplement to petition to deny, initiating a new round of responsive pleadings. On May 14, 1996 the Trustee filed an opposition, on May 29, 1996 Magic City filed a response, on June 4, 1996 KMUS, Inc. (continued...)

are referred to collectively as the "Assignment Applications." For the reasons set forth below we deny the KMUS application for review,⁶ deny the KMUS, Inc. petition to deny and grant the Magic City Application.

Background

3. The complex factual record in this case consists of two intertwined strands. The first is a series of applications to assign the Station Licenses, ultimately, to Magic City, a party against which no allegations have been raised. The second strand is a series of station transactions which Frederick J. Berger and KMUS, Inc. contend establish a pattern of unauthorized assignments of station licenses involving entities controlled by Paul Lowrey ("Lowrey") and related Lowrey misrepresentations. At issue here is whether these unauthorized assignments occurred, whether Lowrey intentionally deceived the Commission concerning the ownership of Station KUUY(AM)/KKAZ-FM, and whether, based on our resolution of these matters, the grant of the Assignment Applications would serve the public interest.

4. On August 6, 1990, the Commission granted an application to assign the Station Licenses from KWW, Inc. to Windsor-Wisconsin, then the licensee of WHSM(AM)/-FM, Hayward, Wisconsin (the "Hayward Station"). The staff included a condition prohibiting the consummation of the assignment prior to the grant of then-pending applications to renew the Station Licenses. The KKAZ-FM license renewal application was granted on November 30, 1990. On January 7, 1991 Windsor-Wisconsin completed its acquisition of KUUY(AM)/KKAZ-FM, notwithstanding the fact that the KUUY(AM) license renewal application remained pending.

5. On February 4, 1991, an application (the "Windsor-Wisconsin Application") was filed to transfer control of Windsor-Wisconsin from 51 percent shareholder Lowrey to two minority shareholders, Arlie Davison ("Davison") and Ross Fleishman, and a third individual, Jerome Russo (collectively, the "WHSM Shareholders"). The Windsor-Wisconsin Application referenced only the WHSM(AM)/-FM licenses and included a filing fee for only two radio station licenses.

⁵(...continued)

filed a reply, and on June 25, 1996 the Trustee filed a further response. These last five pleading are unauthorized and will be dismissed. See 47 C.F.R. § 1.45(c). As a result of our action herein, we dismiss as moot Magic City's July 3, 1996 request to expedite application of silent station KUUY(AM).

⁶ KMUS seeks review of not only the Letter Ruling but also the June 4, 1993 staff action denying the KMUS petition to deny and granting the applications to assign the Station Licenses to Windsor-Wyoming, then to D-I-P, and then to the Trustee. The deadline for seeking review of the 1993 Bureau action expired more than two years ago. See 47 C.F.R. § 1.115(d) (party aggrieved by an action shall file application for review within 30 days of the date of public notice of such action). We will treat the KMUS pleading solely as an application for review of the Letter Ruling. We note that KMUS previously sought reconsideration of each of the issues advanced in the application for review. Accordingly, these matters are appropriately considered at this time. See 47 C.F.R. § 1.115(c).

The Commission's Form 732 consent, authorizing the transfer of control of Windsor-Wisconsin, also listed only the Hayward Station licenses. Neither the Windsor-Wisconsin Application nor the staff action consenting to the proposed Windsor-Wisconsin transfer of control enumerated the Station Licenses, notwithstanding the fact that Windsor-Wisconsin acquired the Station Licenses approximately one month prior to the date on which the Windsor-Wisconsin Application was filed.

6. On August 16, 1991 and prior to the filing of an application for consent to assign the Station Licenses from Windsor-Wisconsin to Windsor-Wyoming, Windsor-Wyoming filed a 1991 annual ownership report on behalf of KUUY(AM) and KKAZ-FM. Lowrey executed the ownership report certification as the president of the putative licensee. On January 22, 1992, Windsor-Wisconsin filed an annual ownership report on behalf of the Hayward Station. Davison executed the ownership report certification as Windsor-Wisconsin's president.⁷ On July 2, 1991, Windsor-Wyoming initiated a Chapter 11 Bankruptcy action which, on January 28, 1992 the Bankruptcy Court converted to a Chapter 7 proceeding. The Trustee was subsequently appointed to oversee the liquidation of Windsor-Wyoming.

7. In 1991 Commission staff recognized that information contained in the KUUY(AM)/KKAZ-FM annual ownership report was at variance with Commission records. To rectify these errors an application to assign the Station Licenses from Windsor-Wisconsin to Windsor-Wyoming was filed in February 1992. At the same time, the Trustee filed short-form applications to assign the Station Licenses from Windsor-Wyoming to D-I-P, and from D-I-P to the Trustee, in order to track developments in the bankruptcy proceeding. Subsequently, the Trustee filed applications to assign the Station Licenses, first to Julander, and then following termination of the underlying Julander purchase agreement, to Magic City.

Discussion

8. **Prima Facie Case.** Under Section 309(d) of the Communications Act, as amended (the "Act"), 47 U.S.C. § 309(d), a petition to deny must allege specific facts which, assumed as true, would demonstrate that grant of the application would be prima facie inconsistent with the public interest. Where a petitioner clears this hurdle, we must determine whether the application presents a substantial and material question of fact. See Astroline Communications Co. v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988). Allegations of fact must be supported by affidavit "except for those [facts] of which official notice may be taken...." 47 U.S.C. § 309(d)(1).

9. KMUS asserts that it has established that Lowrey participated in several unauthorized license assignments in violation of 47 U.S.C. § 310(d). The unauthorized license assignment

⁷ Following the WHSM Shareholders' acquisition of the Windsor-Wisconsin stock, the corporation changed its name to "Arlie L. Davison and Associates, Inc."

allegations are based upon information in the Assignment Applications and the ownership reports covering the Station Licenses and the Hayward Station, matters about which the Commission may take official notice. See McClatchy Newspapers, 61 FCC 2d 279 (1976). Accordingly, KMUS argues that it was error for the staff to find that KMUS had failed to demonstrate that grant of the Assignment Applications would be prima facie inconsistent with the public interest. On this record the staff correctly determined that several of the parties to the Assignment Applications participated in two license assignments without prior Commission consent in violation of 47 U.S.C. § 310(d): the assignment of KUUY(AM) from KWW, Inc. to Windsor-Wisconsin prior to the grant of the station's license renewal application; and the assignment of the Station Licenses from Windsor-Wisconsin to Windsor-Wyoming.⁸

10. Neither Lowrey nor the individuals who acquired control of Windsor-Wisconsin in 1991 dispute these allegations. Lowrey, an experienced broadcaster, controlled the acquiring entities in each of these unlawful transactions. The prior consent provisions of Section 310(d) of the Act are the sine qua non of our broadcast licensing policies. Any violation of this statutory requirement or the related licensing rules, see 47 C.F.R. §§ 73.3540 and 73.3580, is a serious matter. In these circumstances, we do not disagree with KMUS that it has shown that grant of the Assignment Applications would be prima facie inconsistent with the public interest.

11. Where, as here, it appears that unauthorized license assignments have occurred, the Bureau has issued notices of apparent liability for forfeiture to the parties involved. However, in determining the amount of forfeiture penalty, we are required to take into account the "nature, circumstances, extent and gravity of the violations,..., and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(D). In this regard, we also must consider the impact of a potential forfeiture on the ongoing Windsor-Wyoming bankruptcy proceeding. See, e.g., LaRose v. FCC, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974) (requiring the Commission to reach a fair accommodation between its exclusive authority over licensing and federal and state judicial proceedings).

12. The Commission recently rescinded a \$25,000 forfeiture for repeated violations of Section 73.2080. We found that this action was proper because the violator is no longer associated with the station and that the station sale to a party unrelated to the Chapter 7 bankruptcy debtor would satisfy creditors' claims. Dennis Elam, Trustee for Bakcor Broadcasting, Inc., 11 FCC Rcd 1137 (1996); see also Diamond Broadcasting of California, Inc., 11 FCC Rcd 7388 (1996) (NAL rescinded where court orders removal of licensee/wrongdoer in state receivership action and imposition of forfeiture would only harm innocent creditors). These same considerations dissuade us from requiring payment by Windsor-Wyoming or any other

⁸ The Bureau correctly determined that the transfer of control of Windsor-Wisconsin from Lowrey to the WHSM Shareholders complied with Commission requirements. The parties closed in escrow and conditioned consummation upon Commission approval, subsequently obtained, of the stock sale.

Lowrey-controlled entity. A forfeiture would punish innocent creditors of the former licensee and serve no public interest purpose. See also TransNational Network, Inc., 92 FCC 2d 324 (1982) (reducing sua sponte forfeiture from \$8000 to \$100 where violator files for relief under Chapter 11 of Bankruptcy Act).

13. **Substantial and Material Question of Fact.** Having concluded that KMUS made a prima facie case, we must now consider whether KMUS presented a substantial and material question of fact requiring designation of the Assignment Applications on the question whether their grant would serve the public interest. 47 U.S.C. § 309(d)(2). The participation by Lowrey, among others, in the unauthorized assignments of the Station Licenses is not dispositive. See FM Broadcasters of Douglas County, 10 FCC Rcd 10429 (1995) (no basic qualification issue raised by license assignment application notwithstanding unauthorized transfer of control by assignor and issuance of NAL); Mountain Signals, Inc., 6 FCC Rcd 2874 (M.M. Bur. 1991) (license assignment application granted where assignee concedes it assumed station control prior to application filing). Rather, we have designated applications for hearing where the Section 310(d) violation appeared willful, or where parties misrepresented facts or otherwise attempted to deceive the Commission. Seraphin Corporation, 2 FCC Rcd 7177 (1987) (application designated for hearing where Section 310(d) violations appeared willful); C. Devine Media, 8 FCC Rcd 2493 (1993) (application designated for hearing where parties appear to have engaged in sham assignment and provided false and deceptive responses). In this regard, we have treated a party's intent to deceive as a core element of a misrepresentation violation. Fox Television Stations, Inc., 10 FCC Rcd 8452, 8478 (1995); Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); Weyburn Broadcasting Limited Partnership v. FCC, 984 F.2d 1220, 1232 (D.C. Cir. 1993). While the parties to these transactions have shown inexcusable laxity, we agree with the Bureau that there was no intent to deceive the Commission about these matters. In fact, KMUS concedes that it has been "hard pressed to support [its] misrepresentation allegations with documentary evidence." However, it contends that the staff determination that the parties have not engaged in misrepresentation is "based primarily on its mistaken conclusion" that the Windsor-Wyoming Application was filed to facilitate the reunification of station licenses and assets. This argument is unavailing.

14. Record evidence, consisting of the Assignment Applications, related sales agreements and the ownership reports for the Hayward Station, KUUY(AM) and KKAZ-FM establish clear patterns of control at each of these stations. The actions of the WHSM Shareholders do not in any way suggest that they believed that Windsor-Wisconsin held a colorable claim to or interest in the licenses or assets of KUUY(AM)/KKAZ-FM at the time they acquired control of the Hayward Station. Moreover, the WHSM Shareholders have made no attempt to exercise control over KUUY(AM)/KKAZ-FM. The Windsor-Wisconsin Application, filed only four weeks after the consummation of Windsor-Wisconsin's alleged acquisition of KUUY(AM)/KKAZ-FM, lists only the WHSM(AM)/-FM authorizations. The application's EEO program, Exhibit 6, pertains only to the Hayward Station. Furthermore, Exhibit 3 states that "Paul E. Lowrey is acquiring

KUUY-KKAZ in Cheyenne, Wyoming.,” a narrative plainly suggesting that both Lowrey and the WHSM Shareholders viewed the KUUY(AM)/KKAZ-FM acquisition as a separate and distinct transaction. The staff action, as reflected on the Form 732 consent, also lists only the Hayward Station. Subsequently-filed ownership reports also confirm the parties' shared belief that Windsor-Wisconsin was the licensee of the Hayward Station and Windsor-Wyoming the licensee of KUUY(AM)/KKAZ-FM. KMUS does not dispute the fact that the WHSM Shareholders and Lowrey exercised de facto control over WHSM(AM)/-FM and KUUY(AM)/KKAZ-FM, respectively.

15. The principals of Windsor-Wisconsin and Windsor-Wyoming have demonstrated a careless disregard for the Commission's licensing requirements. The Bureau correctly admonished the appropriate parties for these failings. Nevertheless, numerous Commission filings unambiguously reflect Windsor-Wisconsin's and Windsor-Wyoming's consistent, albeit erroneous understanding, as to the Commission licensee of each of these stations. These submissions belie KMUS's contention that the staff's findings are "purely conjectural and contrary to the limited documentary evidence...." The record provides substantial factual support for the Bureau's determination that Windsor-Wyoming acted as de facto licensee of KUUY(AM)/KKAZ-FM although it was not, in fact, the licensee. Thus, it was necessary for Windsor-Wisconsin and Windsor-Wyoming to file remedial applications to bring the stations into compliance with the Act and the Commission's rules.

16. Even if we ignore the considerable record evidence on these matters, we agree with the Bureau that KMUS has failed to raise a substantial and material question of fact as to the parties' alleged "deceitful intent." As KMUS admits, if Windsor-Wisconsin retained ownership of the KUUY(AM)/KKAZ-FM assets then, at most, the application to assign the Station Licenses to Windsor-Wyoming would be "unnecessary." KMUS leaves wholly unexplained how this contention is probative of misrepresentation, *i.e.*, what would motivate a Commission licensee to misrepresent its ownership of radio station assets to gain the "benefit" of filing an "unnecessary" application. Compare C. Devine Media, Inc., 8 FCC Rcd 2493 (1993) (apparent misrepresentation to avoid multiple ownership rules) and Capitol City Broadcasting Corporation, 7 FCC Rcd 1938 (ALJ 1992) (applicant disqualified for misrepresentation regarding information with "obvious comparative impact") with FM Broadcasters of Douglas County, 10 FCC Rcd at 10432 (misrepresentation allegation rejected where there is no basis on which to infer "essential" element of intent to deceive).

17. The Commission's duty to explore matters which might bear on the public interest cannot relieve KMUS of its statutory burden to present properly supported factual allegations based on personal knowledge. KMUS's chief contention, based on its review of certain transactional documents and its understanding of state contractual and securities law principles, is that Windsor-Wisconsin acquired in 1991 and continues to hold the KUUY(AM)/KKAZ-FM station assets. The validity of this argument is best resolved in another forum. The Commission

has consistently declined to consider what, in essence, is a collateral attack on a bankruptcy court determination, here of Windsor-Wyoming's ownership of the KUUY(AM)/KKAZ-FM station assets. See O.D.T. International, 9 FCC Rcd 2575, 2576 (1994) (Commission rejects contention that it should assess impact of pendency of district court counterclaim on related bankruptcy court proceeding to determine whether staff dismissal of assignment application was proper). It is noteworthy that KMUS has not brought to the Commission's attention any claim made in the bankruptcy case, where the Trustee is under a duty to identify all corporate assets, which comports with the ownership theory it advances here.

18. Moreover, we are constrained to note the one-sidedness of this "controversy." Actual control over these stations is not in dispute. Neither Lowrey nor the WHSM Shareholders, the parties to the 1991 transaction in which a controlling interest in Windsor-Wisconsin was transferred, support KMUS's contention that Windsor-Wisconsin retained ownership of the KUUY(AM)/KKAZ-FM station assets. To the contrary, Windsor-Wisconsin has cooperated in the filing and prosecution of the application to assign the Station Licenses to Windsor-Wyoming. The United States Bankruptcy Court for the District of Wyoming has appointed the Trustee to take control of Windsor-Wyoming assets and to serve, subject to Commission consent, as interim licensee of KUUY(AM)/KKAZ-FM. To the extent that this dispute may be "enveloped in smoke," Malloy Broadcasting, 9 FCC Rcd 4822, 4830 (Rev. Bd. 1994), it appears to be solely of KMUS's manufacture.

19. KMUS's reliance on California Public Broadcasting Forum, 752 F.2d 670 (D.C. Cir. 1985), is misplaced. KMUS has failed to support its allegations regarding the ownership of the KUUY(AM)/KKAZ-FM assets with the kind of "telling and pertinent subsidiary facts" that places the intent of Lowrey and/or the WHSM Shareholders in issue. Id. at 679. Unlike California Public Broadcasting Forum, KMUS has not submitted any evidence that the parties to the Windsor-Wyoming Application have represented to any third party that Windsor-Wisconsin, in fact, owns the KUUY(AM)/KKAZ-FM station assets. Even if we were to accept KMUS's interpretation of the relevant transactional documents, we would find this argument unpersuasive. KMUS has not shown that Windsor-Wisconsin's putative ownership of the KUUY(AM)/KKAZ-FM station assets was known, much less believed to be the case, by either Lowrey or the WHSM Shareholders. See Leflore Broadcasting Co. v. FCC, 636 F.2d 454, 462 (D.C. Cir. 1980) ("fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity" sufficient to establish fraudulent intent). The record fully supports the Bureau's resolution of this issue. See Washington Ass'n for Television & Children v. FCC, 665 F.2d 1264, 1269-70 (D.C. Cir. 1981) (application not designated for hearing where petitioner alleged misrepresentational intent but failed to support allegation with affidavits based on personal knowledge).

20. Similarly, we find that the staff properly rejected the KMUS allegation that the Windsor-Wyoming program statement is misleading and deceptive. KMUS has not provided any properly supported evidence of Windsor-Wyoming's alleged intent to deceive the Commission.

KMUS's conclusory claims are insufficient. Gencom, Inc. v. FCC, 832 F.2d 171, 180 n.11 (D.C. Cir. 1987). The Bureau correctly concluded that KMUS has failed to raise a substantial and material question of fact as to whether the parties to the Assignment Applications engaged in misrepresentations before the Commission. Citizens for Jazz on WRVR v. FCC, 775 F.2d 392, 394 (D.C. Cir. 1985).

21. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's rules, the Application for Review filed by Frederick J. Berger and KMUS, Inc. on July 10, 1995 IS DENIED.

22. IT IS FURTHER ORDERED, That the Petition to Deny filed by KMUS, Inc. on February 12, 1996 IS DENIED and the application to assign the licenses of Station KUUY(AM)/KKAZ-FM from James T. Dinneen, Trustee in Bankruptcy to Magic City Media, Inc. (File Nos. BAL-951207ED and BALH-951207EE) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary